

NO. 50046-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JEFF MCGEE,

Appellant,

vs.

DAN GRAZIANO and JOYCE FARLEY GRAZIANO, husband and wife, and the marital community composed thereof; ERIC STROH, an individual; and EDJ PROPERTIES, LLC, a Washington limited liability company,

Respondents.

BRIEF OF RESPONDENTS

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A. INTRODUCTION

This is a personal injury case in which Appellant Jeff McGee (McGee) claims that he was injured when he stepped on a carpet staple in the living room of his rental home, a home from which he had removed the carpet several weeks prior. The home is a rental property owned by Respondent Eric Stroh (Stroh). Stroh, along with Respondents Dan Graziano (Graziano) and Joyce Farley (Farley) are the members of Respondent EDJ Properties, LLC. McGee filed suit against EDJ Properties, Stroh, Graziano, and Farley (the EDJ Defendants), claiming he was a business invitee and arguing the EDJ Defendants breached a duty to protect and/or warn him against the “hazard” of a carpet staple – a hazard that McGee himself created.

The trial court dismissed the EDJ Defendants on summary judgment, finding that McGee’s personal declaration – the only evidence McGee presented in opposition to the motion – failed to create a genuine issue of material fact for trial because it was based on speculation. This Court should affirm. Regardless of McGee’s legal status on the property at the time he stepped on the carpet staple, he cannot legally or factually establish that the EDJ Defendants either owed or breached a duty with respect to a condition that was created by him.

Alternatively, McGee's claims against the EDJ Defendants are barred by implied primary assumption of the risk. As the sole person responsible for the removal of the carpet and the post-removal clean up, McGee had a full subjective understanding of the risk of stepping on a carpet staple and voluntarily chose to encounter that risk, which negates any duty the EDJ Defendants may have owed.

B. RESPONSE TO ASSIGNMENT OF ERROR

McGee identifies a single issue pertaining to his assignment of error to the trial court's grant of summary judgment: whether the EDJ Defendants breached a duty as possessors of land to McGee as a business invitee. (Appellant's Brief at 1) McGee does not identify any issues regarding his status as a tenant in the rental home, the application of the Washington Industrial Health and Safety Act of 1973 (WISHA) to this case, or the application of the doctrine of implied primary assumption of the risk.

C. COUNTER-STATEMENT OF THE CASE

McGee's statement of the case is generally accurate with respect to the nature of his allegations, but his overstatement and omission of certain facts make the following counter-statement necessary.

The facts surrounding the alleged incident are relatively straightforward. In late 2015, McGee arranged with Graziano and Farley

to perform some renovation work – to include removal of carpet, finishing of floors, and painting – at a rental home owned by Stroh and managed by the EDJ Defendants. (CP 26, 69) McGee agreed to perform this work in exchange for free rent and utilities and a lump sum payment of \$2,500.00 inclusive of labor and materials. (CP 26) The parties did not have a written rental agreement. (*Id.*)

McGee argues in his brief that his removal of the carpet and clean-up of the residual debris was a “separate project” that he completed prior to actually moving into the rental home. (Appellant’s Brief at 1-2) However, the only evidence cited for this claim is McGee’s personal declaration, which is somewhat vague on this point. (CP 49) To be sure, McGee does not provide any factual basis (such as details of conversations confirming that all parties had the same understanding as to the alleged separate nature of the projects, cancelled checks, or the like) to create a genuine issue of material fact on this point. Nevertheless, it is undisputed that McGee removed the carpet, tack strips, and padding from the rental home and that he was responsible for the clean-up thereafter. (CP 49) McGee admits that he “did not report the existence of a staple or staples protruding from the floor in the living room” to any of the EDJ Defendants after he removed the carpet. (CP 31)

According to McGee, he moved into the rental home “around Thanksgiving 2015” and began the painting and trim work. (CP 49¹) McGee claims that Farley hired another person (George Armitage) to work on the floors of the rental home in December 2015 and that Armitage was “in and out of the house for several days” during this time frame. (Appellant’s Brief at 3) This assertion is not supported by any competent evidence. In his declaration, McGee states only that it was his “understanding” that Armitage had been hired, and offers no foundation for this “understanding.” (CP 49) Curiously, despite claiming that Armitage was “in and out of the house,” McGee does not offer any testimony that he was actually doing any work or provide evidence of any work allegedly done by Armitage.

After he had been residing in the rental home for nearly a month, McGee claims that on December 21, 2015, he stepped on a carpet staple on the floor of the living room that somehow penetrated the sole of the “shower shoes” he was allegedly wearing at the time and punctured his toe. (CP 50, 70) McGee claims injury as a result. (*Id.*)

¹ McGee originally alleged in his amended complaint that he moved into the rental home in December 2015. (CP 70) McGee did not designate his original summons and complaint, or his amended summons and complaint, as Clerk’s Papers. *See* RAP 9.6(b)(1)(C). McGee’s First Amended Summons and First Amended Complaint for Personal Injuries can be found in Respondents’ Supplemental Designation of Clerk’s Papers, CP 66-72.

McGee filed suit, alleging that he was a business invitee at the time he stepped on the staple and that the EDJ Defendants either failed to maintain and/or inspect the rental home to prevent his injury or failed to warn him of the existence of an “unsafe condition.” (CP 70) McGee claims that this alleged failure to maintain and/or warn “created a dangerous condition” that was a proximate cause of his injuries. (*Id.*) The EDJ Defendants answered, denying liability. (CP 75-76)

In November 2016, the EDJ Defendants jointly moved for summary judgment, arguing that McGee could not factually or legally support any theory of liability against them for injury allegedly arising out of a condition that was created by McGee and that he did not report to them. (CP 1-21) The only evidence McGee presented in opposition to the motion was his personal declaration, which essentially reiterated the essential facts surrounding the incident (*i.e.*, that McGee was responsible for removing the carpet, tack strips, and rubber padding and the clean-up thereof from the rental home and that he stepped on a loose carpet staple the following month while he was residing in the rental home) and offered McGee’s “understanding” as to George Armitage. (CP 48-50)

The trial court granted the EDJ Defendants’ motion. (CP 61-63) In so doing, the trial court noted two specific deficiencies in McGee’s declaration. First, the court observed that McGee had failed to establish

the carpet staple was “a dangerous condition in the first place.” (VRP at 10:17-18; 14:2-7) Second, the court rejected McGee’s argument that summary judgment should be denied because the EDJ Defendants failed to prove he had “exclusive control” over the premises (which, apparently, was the purpose of McGee offering his “understanding” regarding Armitage’s presence in the rental home):

You are making me assume. You are making me assume. I can’t do that. You are making me assume that after he was done pulling up the carpet and throwing it out front somebody else came into the house. . . . I have to go based upon [McGee’s] declaration. His declaration is deficient with respect to any indication that there is another person responsible for this dangerous condition, if it even is a dangerous condition, which I am not making a finding of that.

* * *

So nothing tells me that there was anyone else who intervened[,] who came into the home[,] who could have been responsible for this dangerous condition[,] who would have brought it to the attention or should have brought it to attention [of] . . . the owner or manager of the property so that they have a duty and burden with respect to anyone that moves in that property. There is nothing. So I’ve got a deficient declaration, and I have to grant summary judgment based on that.

(VRP at 13:19-23; 14:2-7; 15:13-23)

This appeal followed.²

² McGee did not designate his Notice of Appeal in his Clerk’s Papers. See RAP 9.6(b)(1)(A).

D. ARGUMENT

1. Standard of Review

McGee correctly states the standard of review for an order granting summary judgment, but neglects to address the law related to the quantum of evidence sufficient to defeat a motion for summary judgment, which is the primary issue in this appeal.

McGee argues that “[f]or purposes of this appeal, all facts in dispute must be resolved in favor of [him].” (Appellant’s Brief at 5) This is not an accurate statement of the law. Rather, “[a]ll facts and **reasonable** inferences are considered in a light most favorable to the nonmoving party.” *Munich v. Skagit Emergency Comm. Center*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012) (emphasis added). Summary judgment may be granted if the evidence shows there is “no genuine issue as to any **material fact** and that the moving party is entitled to a judgment as a matter of law.” CR 56(c) (emphasis added). Accordingly, a nonmoving party may not defeat a motion for summary judgment simply by identifying a factual discrepancy, but must identify and sufficiently support a genuine issue regarding a material fact – a fact that controls the outcome of the litigation. *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 4, 277 P.3d 679 (2012).

“The nonmoving party cannot merely claim contrary facts and may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value.” *Cano-Garcia v. King County*, 168 Wn. App. 223, 230, 277 P.3d 34 (2012). A declaration submitted in opposition to a summary judgment motion “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” CR 56(e).

It is not enough that the affiant be ‘aware of’ or be ‘familiar with’ the matter; personal knowledge is required. . . . The affiant’s ‘understanding’ of a fact is similar to his being ‘aware’ of it. It says nothing about personal knowledge and is inadmissible.

Marks v. Benson, 62 Wn. App. 178, 182-83, 813 P.2d 180 (1991).

A defendant may move for summary judgment by pointing out to the trial court that the plaintiff lacks sufficient evidence to support his case. *Seybold v. Neu*, 105 Wn. App. 666, 677, 19 P.3d 1068 (2001). Where a plaintiff cannot meet a necessary element of the relevant cause of action, all other facts are rendered immaterial and summary judgment for the defendant is appropriate. *Shields v. Morgan Financial, Inc.*, 130 Wn. App. 750, 758, 125 P.3d 164 (2005); *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 117, 126, 330 P.3d 190 (2014).

2. **Whether a Tenant or an Invitee, McGee Fails to Create a Genuine Issue of Material Fact Whether the EDJ Defendants Owed or Breached Any Duty to Him With Respect to the Carpet Staple.**

The only cause of action McGee has asserted against the EDJ Defendants is one of negligence. (CP 71) To establish such a claim, McGee must show that the EDJ Defendants owed a duty to him, that they breached that duty, that he suffered an injury, and that their breach was the proximate cause of his injury. *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013). McGee “must establish a **material fact** as to each element of negligence to defeat summary judgment.” *Id.* (emphasis added). He cannot do so. The trial court’s order dismissing his claims against the EDJ Defendants on summary judgment should be affirmed.

a. **McGee’s legal status in the rental home when he stepped on a carpet staple was tenant, not business invitee.**

McGee alleges that he was a business invitee vis-à-vis the EDJ Defendants. (CP 70) He is incorrect. The legal relationship between McGee and the EDJ Defendants is one of landlord-tenant, as established by *Najewitz v. City of Seattle*, 21 Wn.2d 656, 152 P.2d 722 (1944).

In *Najewitz*, the plaintiff entered into an agreement with the City of Seattle to move into a home on City property and “put and keep the house and other improvements on the property in repair and in useful

condition[.]” *Id.* at 657. The City did not collect any rent. *Id.* at 658. After being threatened with ejectment from the property, the plaintiff requested an injunction and argued that he had an employment relationship with the City (which would require “just cause” on the part of the City to terminate his employment). *Id.* at 657-58.

On appeal from an order sustaining a demurrer to the plaintiff’s complaint, the Court rejected the plaintiff’s argument as to his legal status:

The legal effect of the agreement pleaded created the relationship of landlord and tenant, not that of employer and employee. In its simple and ultimate aspect, it was an agreement whereby plaintiff was permitted to occupy the house on the property in consideration of his services in taking care of and keeping the property in repair.

Id. at 658. The Court further held that the nature of the tenancy between the plaintiff and the City was a tenancy at will “and as such could have been terminated without notice.” *Id.* at 658.

The *Najewitz* decision controls here and establishes the legal relationship between McGee and the EDJ Defendants as landlord-tenant. As McGee alleges in his amended complaint, Graziano and Farley “permitted [him] to reside in the [home] while he performed the work he was hired to do.” (CP 69-70) This undisputed fact establishes an agreement of occupancy and “[a]ll declarations and conclusions to the

contrary cannot change the legal relationship of the parties established by the ultimate facts alleged.” *Najewitz*, 21 Wn.2d at 658.

McGee attempts to distinguish *Najewitz* by noting it was decided prior to the enactment of Washington’s Residential Landlord Tenant Act (RLTA), RCW 59.18, *et seq.* (Appellant’s Brief at 7) According to McGee, the RLTA has somehow superseded the *Najewitz* decision based on the language of RCW 59.18.040(8), which exempts “[o]ccupancy by an employee of a landlord whose right to occupy is conditioned upon employment in or about the premises” from the governance of the RLTA. (Appellant’s Brief at 7-8) This statute has no bearing on the issues in this appeal, for two reasons.

First, nothing in the RLTA suggests that it was designed to preempt or define the legal universe of landlord-tenant relationships. The fact that particular living arrangements are exempted from the RLTA does not necessarily mean that any exempted arrangement is not a landlord-tenant relationship.³ The RLTA establishes certain rights and remedies of both landlords and tenants, and is one of three potential theories upon

³ It is questionable whether RCW 59.18.040(8) would necessarily exempt the parties’ arrangement from the RLTA. That section applies to employees of a landlord. Generally, an employee is defined as an agent employed by an employer “to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the [employer].” *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002) (quoting Restatement (Second) of Agency § 2(2)). McGee makes no effort to point out any facts that would bring him within this definition.

which a tenant may base a claim for personal injuries against a landlord. *Martini*, 178 Wn. App. at 167. It is not the sole legal authority on what does and does not constitute a landlord-tenant relationship.

Second, McGee's reliance on RCW 59.18.030(27) is misplaced. (Appellant's Brief at 7) Under the RLTA, the term "rental agreement" is defined as "all agreements which establish or modify the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of a dwelling unit." RCW 59.18.030(25). Nothing in this definition requires a *written* rental agreement. Contrary to McGee's assertion, the EDJ Defendants have not conceded that the parties did not have a rental agreement. The EDJ Defendants have merely acknowledged that there was no *written* rental agreement. (CP 26)

The fact that the parties did not have a written rental agreement does not preclude the existence of a landlord-tenant relationship. (Appellant's Brief at 7) As held in *Najewitz*, Washington common law recognizes tenancies at will, agreements for tenancy for an indefinite term where no monthly or other periodic rent is reserved. *Najewitz*, 21 Wn.2d at 659. The undisputed facts regarding the circumstances of McGee's occupancy of the rental home establish a landlord-tenant relationship. McGee occupied the home and, as he acknowledges, was allowed to

occupy the home rent-free in consideration for the work he performed.

The *Najewitz* decision controls here.

b. The EDJ Defendants did not breach any duty to McGee as a tenant.

As a tenant, McGee can potentially hold the defendants liable under three theories: (1) the rental agreement, (2) the common law, or (3) the RLTA. *Martini*, 178 Wn. App. at 167. Summary judgment was properly granted because McGee lacks sufficient evidence to create a prima facie case on any of these theories.

First, there is no “rental agreement” that exists between the parties. McGee was a tenant at will, meaning that he “had come upon the premises with the permission of the owner, the tenancy was terminable without notice and provided for no monthly or periodic payments.” *Turner v. White*, 20 Wn. App. 290, 292, 579 P.2d 410 (1978). A tenancy at will is “terminable only upon a demand for possession, allowing the tenant a reasonable time to vacate.” *Id.* (citing *Najewitz*). McGee does not identify any violation of these terms, or explain how any such alleged violation would be relevant to his claims in this matter.

Second, McGee cannot establish that any of the EDJ Defendants breached any duty to him under the common law. McGee alleges that he stepped on a carpet staple in the living room floor, but a landlord does not

have any duty to repair non-common areas (such as the living room of the tenant's premises) absent an express covenant to repair. *Aspon v. Loomis*, 62 Wn. App. 818, 826, 816 P.2d 751 (1991). There is no evidence of any such covenant between the parties in this case.

A landlord may be liable to a tenant under a "latent defect" theory, but that, too, does not apply here. Such a claim is premised on the existence of a "concealed dangerous condition known to the landlord." *Id.* This theory does not impose any duty upon the landlord to discover or repair defective conditions, but rather only makes a landlord liable for failing to inform the tenant of known dangers. *Id.* at 826-27. Here, there is no evidence that any of the EDJ Defendants were aware of the existence of the exposed staple. Indeed, McGee admits that he did not so inform them. (CP 31)

Finally, McGee argues that the RLTA does not apply in this case. (Appellant's Brief at 7-8) Accordingly, he cannot maintain any claim against the EDJ Defendants under the RLTA.

McGee does not acknowledge, let alone dispute, any of these legal theories in his brief. Moreover, nothing in McGee's declaration is sufficient to create a genuine issue of material fact whether the EDJ Defendants breached any duty to him as a tenant for injuries he claims resulted from a condition that he created and that he admits he did not tell

the EDJ Defendants about. This Court should affirm the summary judgment dismissal.

c. The EDJ Defendants did not breach any duty to McGee as a business invitee.

McGee's "business invitee" theory of liability is based on Section 343 of the Restatement (Second) of Torts. (Appellant's Brief at 9) Preliminarily, McGee suggests that summary judgment is never appropriate in a Section 343 case, stating that whether a landowner has taken reasonable precautions to protect invitees is always a question of fact. (*Id.*) This is incorrect. An issue of fact can be decided as a matter of law when reasonable minds cannot differ. *See, e.g., Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998).

This is precisely one of those cases. Section 343 states:

A possessor of land is subject to liability . . . if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Pruitt v. Savage, 128 Wn. App. 327, 330-31, 115 P.3d 1000 (2005). This section does not apply in this case for two reasons. One, as noted above, McGee was not a business invitee at the time of the alleged incident; he was a tenant. Two, "[b]y its terms, this section applies only to one who is

a ‘possessor of land.’” *Id.* at 331. “A possessor of land is a person who is in occupation of land with intent to control it.” *Jarr v. Seeco Const. Co.*, 35 Wn. App. 324, 327, 666 P.2d 392 (1983). This more accurately describes McGee, the resident of the rental home, than it does the EDJ Defendants. In the landlord-tenant context, Section 343 typically does not apply to landlords because the landlord is not the “possessor” of non-common areas (such as the living room, where McGee claims to have stepped on the carpet staple). *Pruitt*, 128 Wn. App. at 331.

Even assuming that Section 343 applies in this case, McGee does not have sufficient evidence to create a genuine issue of material fact whether the EDJ Defendants breached any duty to him. A possessor owes a duty to exercise reasonable care to protect its invitees from harm. *O'Donnell v. Zupan Enterprises, Inc.*, 107 Wn. App. 854, 858, 28 P.3d 799 (2001). This duty is triggered by evidence of the possessor’s actual or constructive notice of an unsafe condition. *Id.* McGee does not offer any evidence of actual notice. As to constructive notice, McGee argues that the EDJ Defendants should have inspected the premises after he removed the carpet and before he moved into the rental house because he assumed the home had been “made . . . safe” for him. (Appellant’s Brief at 10) This argument fails.

First, McGee does not offer any argument or evidence that the existence of a carpet staple constitutes an unreasonably dangerous condition; *i.e.*, that it creates an *unreasonable* risk of harm to invitees. *See Coleman v. Ernst Home Center, Inc.*, 70 Wn. App. 213, 223, 853 P.2d 473 (1993) (“there is no liability for harm from conditions from which no *unreasonable* risk was to be anticipated” (emphasis in original)). Indeed, McGee appears to presume that because he was allegedly injured by a carpet staple, the staple must necessarily be an unreasonably dangerous condition for which the EDJ Defendants are liable. This has been soundly rejected by Washington courts: “The fact of injury is not, of course, sufficient to prove a dangerous condition.” *Hansen v. Wash. Natural Gas Co.*, 95 Wn.2d 773, 778, 632 P.2d 504 (1981).

Any home that has carpet installed in it contains carpet staples. It is McGee’s exposure of the staple via his removal of the carpet, tack strips, and padding; his failure to adequately clean up after this removal; and his admitted failure to report the existence of a carpet staple on the living room floor that created a safety issue. (CP 49) McGee cannot hold the EDJ Defendants liable for an allegedly unsafe condition that he created and that he did not tell them about.

On this point, the case of *English v. Kienke*, 848 P.2d 153 (Utah 1993), is instructive.⁴ In that case, the plaintiff was looking for a house to rent but was having some financial difficulty. *Id.* at 154. The defendant property owner, whose wife was a friend of the plaintiff's mother, had a rental property that was in need of repairs. *Id.* The plaintiff proposed that he would repair and renovate the house in lieu of rent, an arrangement to which the defendant agreed. *Id.*

One of the items in need of repair was the house's front porch. The plaintiff agreed to repair the porch and in the course of that work, discovered that the wood supporting the floor of the porch had rotted. *Id.* at 154-55. The plaintiff removed the entire bottom of the porch and placed temporary supports on the sides of the porch to support the roof during his work. *Id.* at 155. Two weeks later, while the plaintiff was working on the porch, the roof collapsed. *Id.* The plaintiff later died of his injuries. *Id.*

The plaintiff's estate filed suit, asserting several causes of action against the defendant, including common law claims based on the plaintiff's status as a tenant and, alternatively, his status as an invitee. *Id.* at 155-56. The court rejected both claims, first holding that the defendant, "as a landlord, is not liable for an injury caused by a dangerous condition

⁴ A copy of this opinion is attached for the Court's convenience at Appendix A.

created by a tenant.” *Id.* at 156. The court also held that there was no basis to impose on the defendant any duty under Section 343 to protect the plaintiff from the hazard he created when the defendant “did not live on the property, had not been there for two weeks, and did not supervise or exercise any control over [the plaintiff’s] work.” *Id.*

The same result should abide here. Any danger presented by the loose carpet staple was created by McGee in the course of his work in the rental home. The EDJ Defendants did not know of the loose staple and McGee did not tell them about it. McGee, not any of the EDJ Defendants, resided at the rental home and he does not offer any evidence that they supervised or exercised any control over his work. Even assuming McGee could be classified as a “business invitee,”⁵ the EDJ Defendants did not breach any duty to him with respect to the carpet staple.

Second, McGee does not cite any legal authority holding that, under the particular facts of this case, “reasonable care” for purposes of Section 343 required the EDJ Defendants to inspect the rental home, where its alleged invitee is residing, to discover a defect that the invitee created, and then warn the invitee of the existence of that defect. Instead,

⁵ Interestingly, the *English* court did not decide as a matter of law whether the plaintiff was properly classified as an invitee. The court only assumed, for purposes of its analysis, that the defendant was a “possessor” of the property, noting that “a possessor is one in actual physical possession” and that the defendant “did not live on the property; it was a vacant rental unit in need of repairs and renovation[; and only] visited the premises only occasionally.” *English*, 848 P.2d at 156.

McGee claims he was entitled to assume that the EDJ Defendants had made the home “safe” before he moved in. (Appellant’s Brief at 10) However, at no point in his declaration does McGee state that he actually made such an assumption. McGee’s argumentative assertion that the EDJ Defendants should have taken “precautionary measures” to protect him from a hazard that he created is not prima facie evidence of negligence.

Finally, McGee claims there is an issue of fact whether he created the hazard posed by the loose carpet staple. (Appellant’s Brief at 11) This is a somewhat curious argument given that McGee claims his injury resulted from the EDJ Defendants’ failure to inspect the property after McGee removed and cleaned up the carpet and before he moved into the rental home. (Appellant’s Brief at 10) If McGee was not responsible for the staple, then how could the EDJ Defendants have discovered anything to warn him about during an inspection that McGee claims they had a legal duty to conduct after he removed the carpet?

The inconsistency in these two positions highlights the legal insufficiency of McGee’s evidence. McGee is asking this Court (as he asked the trial court) to speculate that some unknown person at some unknown time through some unknown method may have tracked in a loose carpet staple within a very specific time frame – after McGee removed the carpet and cleaned up and either before McGee moved into

the rental home or after he moved in. Speculation regarding the possibility of such a scenario does not create a material issue of fact. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 310, 151 P.3d 201 (2006). While summary judgment evidence is reviewed the light most favorable to the nonmoving party, that party must, in the first instance, come forward with actual evidence to review. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989) (“the moving party has the burden of showing there is no genuine issue of material fact, but this does not relieve the nonmoving party of the burden of producing evidence that would support a genuine issue for trial”).

McGee’s invitation to speculate should be declined. Washington courts have previously observed that “the distinction between that which is mere conjecture and what is a reasonable inference” must be recognized. *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947). McGee is asking this Court to engage in the former, but “in matters of proof, [courts] are not justified in inferring, from mere possibilities, the existence of facts.” *Id.* at 810-11. McGee has failed to come forward with any competent, admissible evidence demonstrating the genuine existence of a material fact as to the EDJ Defendants’ alleged liability under Section 343. Summary judgment should be affirmed.

3. The EDJ Defendants Are Not Subject to WISHA Requirements

McGee next attempts to characterize the EDJ Defendants as employers, jobsite owners, or general contractors in order to argue that they owed a duty to McGee under WISHA. (Appellant's Brief at 11) This argument should be rejected.

First, the issue of WISHA liability is not properly before this Court for review. In his complaint, McGee alleged that he was a business invitee. (CP 70) He did not allege that he was a "worker" entitled to protection under WISHA, that the EDJ Defendants owed him any duties under WISHA, or that the EDJ Defendants breached any such duties. "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Karlberg v. Otten*, 167 Wn. App. 522, 530, 280 P.3d 1123 (2012) (internal quotation marks omitted).

Even if this argument is properly before this Court, it fails because McGee does not establish that the EDJ Defendants are subject to WISHA in the first instance. The purpose of WISHA is to ensure safe working conditions for workers in Washington. RCW 49.17.010. In this regard, WISHA requires employers to comply with two distinct duties:

Each employer:

(1) Shall furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees: PROVIDED, that no citation or order assessing a penalty shall be issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department covering the unsafe or unhealthful condition of employment at the workplace; and

(2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

RCW 49.17.060. The Washington Supreme Court explained the distinction between these two sections as follows:

These two distinct duties arise from RCW 49.17.060's two subsections. Subsection (1) creates a 'general duty' to maintain a workplace free from recognized hazards; this duty runs only from an employer to its employees. Subsection (2), on the other hand, creates a 'specific duty' for employers to comply with WISHA regulations. Unlike the general duty, the specific duty runs to *any* employee who may be harmed by the employer's violation of the safety rules.

Afoa v. Port of Seattle, 176 Wn.2d 460, 471, 296 P.3d 800 (2013) (internal citations omitted; emphasis in original).

Although McGee does not clearly state whether the EDJ Defendants owed him the general duty under Subsection (1) or the specific duty under Subsection (2), it appears that he believes the latter applies in this case. (Appellant's Brief at 15) He offers very little argument on this issue; he simply offers an argumentative conclusion that the EDJ

Defendants are liable under WISHA because they somehow had “innate supervisory authority” that gave them “control over the workplace.” (*Id.*) He cites no facts to support this conclusion.

Moreover, McGee does not offer any facts or argument why the EDJ Defendants should be considered “employers” subject to WISHA regulations. This omission is important, because “even the specific duty does not create per se liability for anyone deemed an ‘employer.’” *Afoa*, 176 Wn.2d at 472. A “jobsite owner” (even assuming the rental home could be considered a “jobsite” for purposes of WISHA) has a duty to comply with WISHA only if he retains control over the manner in which a contractor completes his work. *Kamla, supra*, 147 Wn.2d at 125. McGee does not offer any evidence that the EDJ Defendants retained any such control over the manner in which he performed his work. McGee cites *Doss v. ITT Rayonier, Inc.*, 60 Wn. App. 125, 803 P.2d 4 (1991), but that case is factually distinguishable. In *Doss*, it was noted that the jobsite owner required compliance with safety regulations and assigned a safety supervisor to the jobsite who “kept close watch on the work[.]” *Id.* at 126-27. No such similar evidence exists in this case.

Finally, McGee makes no attempt to identify what WISHA regulation the EDJ Defendants allegedly violated. *See, e.g., id.* at 126-27 (WISHA regulation regarding safety net requirements whenever workers

are permitted to be underneath a work area not otherwise protected from falling objects); *Afoa*, 176 Wn.2d at 500 (Madsen, C.J., concurring/dissenting) (WISHA regulation regarding vehicle speed restriction). WISHA is not a form of strict liability, and a violation of an unspecified WISHA regulation cannot be inferred simply because McGee allegedly suffered an injury.

“In sum, it is settled law that jobsite owners have a specific duty to comply with WISHA regulations if they retain control over the manner and instrumentalities of work being done on the jobsite.” *Afoa*, 176 Wn.2d at 472. Even assuming this issue is properly before this Court, McGee has failed to establish that WISHA applies in this case and McGee’s nonspecific claims of WISHA violations cannot defeat summary judgment.

4. Implied Primary Assumption of the Risk Applies.

Alternatively, regardless of McGee’s status in the rental home at the time he stepped on the staple, summary judgment dismissal of his claims was warranted because he assumed the risk of stepping on a carpet staple and his voluntary assumption of such risk relieved the EDJ Defendants of any liability.

Implied primary assumption of the risk arises “when a plaintiff has consented to relieve the defendant of a duty – owed by the defendant to

the plaintiff – regarding specific known risks.” *Hvolboll v. Wolff Co.*, 187 Wn. App. 37, 47-48, 347 P.3d 476 (2015). There are three elements: “The evidence must show the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk and (3) voluntarily chose to encounter the risk.” *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987). When this doctrine applies, “the plaintiff’s consent negates any duty the defendant would have otherwise owed to the plaintiff.” *Hvolboll*, 187 Wn.2d at 48.

McGee first argues that the he was unaware of the presence of the carpet staple. (Appellant’s Brief at 16) This defies common sense. McGee admits that he was responsible for the removal of the carpet, tack strips, and padding in the rental home, and for the post-removal clean up. (CP 49 at ¶ 3) This undisputed evidence establishes that McGee appreciated the specific hazard (a loose carpet staple) that allegedly caused his injury. *See Wirtz v. Gillogly*, 152 Wn. App. 1, 9, 216 P.3d 416 (2009). His (legally insufficient) argument that the EDJ Defendants should have inspected the home to identify and remove a hazard that McGee created for McGee’s protection does not have any bearing on his awareness of the risk of stepping on a carpet staple.

Moreover, McGee knowingly and voluntarily assumed the risk inherent in carpet removal. A plaintiff has sufficient knowledge if he “at

the time of decision, actually and subjectively knew . . . all facts that a reasonable person in the plaintiff's shoes would want to know and consider" at the time he chose to incur the risk. *Home v. N. Kitsap Sch. Dist.*, 92 Wn. App. 709, 720, 965 P.2d 112 (1998). Here, the carpet staple was transformed into an alleged "hazard" as a result of McGee's removal of the carpet and his apparently insufficient post-removal clean up. To avoid injury from stepping on a loose carpet staple in a home where carpet had been recently removed, a reasonable person in McGee's shoes would want to know when the carpet was removed, whether the staples had been removed, and what efforts had been made to clean up after the removal of the carpet. These are facts that were known actually and subjectively to McGee – and to McGee alone – as the person responsible for removing the carpet.

Finally, McGee argues he did not act voluntarily or knowingly because he does not know what the EDJ Defendants did in the time between when he removed and cleaned up the carpet and when he moved into the rental home. (Appellant's Brief at 17) His suggestion that the EDJ Defendants breached a duty to him during that interval of time misses the mark. An alleged breach of duty does not create an issue of fact on this issue, because implied primary assumption of the risk involves the plaintiff's implied consent to relieve the defendant of a duty regarding

known and appreciated risks. Whether a defendant may or may not have breached a duty becomes irrelevant if a plaintiff manifests his consent to relieve the defendant of that duty.

Implied primary assumption of the risk “depends on whether the risk the plaintiff encountered was inherent in the activity in which the plaintiff was engaged.” *Gleason v. Cohen*, 192 Wn. App. 788, 800, 368 P.3d 531 (2016). In this case, the activity in which McGee was engaged was carpet removal and clean-up; the risk of stepping on a loose carpet staple is undeniably inherent in that activity. McGee voluntarily encountered that risk, because he “had a reasonable opportunity to act differently or proceed on an alternate course that would have avoided the danger.” *Zook v. Baier*, 9 Wn. App. 708, 716, 514 P.2d 923 (1973).⁶ As such, even assuming the EDJ Defendants owed any legal duty to McGee to protect him from an allegedly dangerous condition that he created, his claims are barred by implied primary assumption of the risk.

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⁶ In their opening memorandum to the trial court, the EDJ Defendants identified various courses of action McGee could have taken, such as ensuring that all carpet staples were removed when he pulled up the carpet or, if he was unsure whether any loose staples remained, restricting his access or taking better precautions until he could identify or remove them. (CP 11) McGee did not dispute any of these suggestions in response to the EDJ Defendants’ motion. (CP 46)

E. CONCLUSION

The EDJ Defendants respectfully request that this Court affirm the trial court's order dismissing McGee's claims against them. McGee does not have sufficient, admissible evidence to create a genuine issue of material fact whether the EDJ Defendants owed or breached any duty to him, whether as a tenant or an invitee. WISHA does not apply in this case. Alternatively, McGee's claims are barred by implied primary assumption of the risk. Costs on appeal should be awarded to the EDJ Defendants.

RESPECTFULLY SUBMITTED this 26 day of June, 2017.

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APPENDIX A

KeyCite Yellow Flag - Negative Treatment
Distinguished by Haile v. Hickory Springs Mfg. Co., D.Or.,
November 14, 2014

848 P.2d 153
Supreme Court of Utah.

Daniel ENGLISH, as personal
representative of the Estate of Robert
English, Plaintiff and Petitioner,

v.

Albert KIENKE, Defendant and Respondent.

No. 890281.

|

Feb. 4, 1993.

Personal representative of estate of tenant, who was killed when porch roof fell on him while he was rebuilding bottom part of porch, brought action against landlord for wrongful death. The Third District Court, Salt Lake County, David S. Young, J., entered summary judgment in favor of landlord, and representative appealed. The Court of Appeals, 774 P.2d 1154, affirmed, and representative appealed. The Supreme Court, Howe, Associate C.J., held that: (1) landlord was not liable for injury caused by dangerous condition created by tenant; (2) even if landlord was possessor of land, he was not liable for injury caused by dangerous condition created by tenant as invitee and business visitor; (3) tenant who lived in house rent-free in exchange for making repairs was not employee under Workers' Compensation Act; and (4) landlord was not statutory employer under Act.

Decision of the Court of Appeals affirmed.

Stewart, J., filed dissenting opinion.

West Headnotes (9)

[1] **Landlord and Tenant**

↔ Roofs and ceilings

Landlord and Tenant

↔ Decks, balconies, and patios

Landlord and Tenant

↔ Conduct or fault of injured party

Landlord was not liable for death of tenant who was killed when porch roof fell on him while he was rebuilding bottom part of porch which he had removed; tenant created dangerous condition after he took possession and landlord warned tenant to adequately support roof.

Cases that cite this headnote

[2] **Landlord and Tenant**

↔ Duty to repair

If landlord was possessor of land, tenant, who lived in house rent-free in exchange for his labor in making repairs to house was "invitee" and "business visitor"; tenant was workman who came to make alterations or repairs on land used for residence purposes and was invited to enter or remain on land for purpose directly or indirectly connected with business dealings with possessor of land.

2 Cases that cite this headnote

[3] **Negligence**

↔ Care required in general

Possessor of land has duty to warn invitee about hazards present on land when invitee enters and that possessor should expect invitee will not discover or realize, and hazards possessor creates after invitee's entry.

3 Cases that cite this headnote

[4] **Landlord and Tenant**

↔ Roofs and ceilings

Even if landlord was possessor of property, so that tenant was invitee, landlord was not liable for death of tenant who was killed when porch roof fell on him while he was rebuilding porch of leased house in which he lived rent-free in exchange for his making

repairs to house; tenant created hazard by removing bottom part of porch, landlord did not live on property, landlord had not been there for two weeks prior to accident, and landlord did not supervise or exercise control over tenant's work.

Cases that cite this headnote

[5] **Negligence**

☛ Care required in general

Duty owed by possessor of land, as to hazards on land, to any classification of invitee is the same, and does not extend to hazards created by invitee.

6 Cases that cite this headnote

[6] **Landlord and Tenant**

☛ Duty to repair

Fact that landlord may have had superior knowledge of construction practices and skills did not affect duty he might have owed as possessor of land to tenant who lived in leased house rent-free in exchange for making repairs to house; landlord did more than law required when he warned tenant to adequately support roof after tenant had removed bottom part of porch.

1 Cases that cite this headnote

[7] **Workers' Compensation**

☛ Injuries or Death for Which Compensation May Be Had

Workers' Compensation Act provides that proof of injury shall constitute prima facie evidence of negligence on part of uninsured employer and that burden shall be upon employer to show freedom from negligence resulting in injury. U.C.A.1953, 35-1-57.

Cases that cite this headnote

[8] **Workers' Compensation**

☛ Determination and tests of status in general

In light of undefined nature of compensation arrangement and wide discretion allowed him in choosing projects and manner in which he would proceed, tenant, who lived in leased house rent-free in exchange for making repairs to house, was not "employee" of landlord for purposes of Workers' Compensation Act; there was no agreement as to landlord's right to direct or control tenant's work, landlord's supervision was sporadic at best, tenant was not given specific job assignment with respect to projects he undertook, tenant was not paid on project basis, and there was no agreement as to how many hours of labor tenant would perform each week or month. U.C.A.1953, 35-1-42.

3 Cases that cite this headnote

[9] **Workers' Compensation**

☛ Statutory employers

Landlord, who owned house in which tenant lived rent-free in exchange for making repairs to house, was not statutory employer under Workers' Compensation Act. U.C.A.1953, 35-1-42(2).

1 Cases that cite this headnote

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ON CERTIORARI TO THE
UTAH COURT OF APPEALS

HOWE, Associate Chief Justice:

We granted certiorari in this case to review the court of appeals' decision reported at 774 P.2d 1154 (Utah Ct.App.1989). In its decision, the court of appeals affirmed a summary judgment that had been granted in favor of defendant Albert Kienke and against plaintiff Daniel English.

Kienke, a full-time employee of the Utah Department of Transportation, owned several rental residential properties in the Salt Lake City area. He did most of the repair work on his properties, although on two or three occasions, he hired independent contractors. Robert English, plaintiff's son, learned from his mother, a friend of Kienke's wife, that Kienke might have a house to rent. Kienke showed English a house on Windsor Street in Salt Lake City that was run down and in need of extensive repairs. Since English was recently divorced and his finances were tight, he proposed to Kienke that he would repair and renovate the house in lieu of rent. Kienke accepted. However, the parties reached no formal agreement or understanding as to just how much work English would be required to perform each month. There was no understanding as to which projects would be completed, by what date, or how English's time would be valued.

English had little experience in construction, while Kienke had significant experience in construction and carpentry. Kienke showed English the areas of the house that needed repair work. English would commence a project on a particular part of the house by informing Kienke of his general plans and ideas, and Kienke would give his agreement. English would then perform the work, apparently without direction or supervision. As materials were needed, English purchased them and Kienke reimbursed him. Kienke visited the house to inspect the work only occasionally. He testified in his deposition that he did not see English for a month or two at a time. For the duration of their

relationship, English worked on several different projects throughout the house.

Kienke indicated that the kitchen and back porch were in particular need of repair. He and English also discussed in general terms other areas of the house needing repair, including the front porch. Kienke was aware that a beam in the roof of the front porch was sagging, that the porch ceiling needed repairs, and that the posts supporting the porch had rotted. English agreed to repair the porch, and he and Kienke discussed the work to be done before English commenced the repairs. In performing the work, English usually used *155 his own hand tools but also used a few tools belonging to Kienke, such as a power saw, a shovel, a tub to mix concrete in, and a roof jack.

After English had begun work on the porch, he asked Kienke to come to the house and inspect his progress. Kienke found that English had removed the entire bottom part of the porch. English explained to Kienke that he had found that the wood supporting the floor of the porch had rotted and that he had decided to replace the porch. Kienke told English to place two-by-four boards on the sides of the porch to support the roof but did not instruct him on precisely how to proceed. English installed the temporary supports, but two weeks later, while he was working on the porch, the roof collapsed, seriously injuring him. He later died from those injuries.

Daniel English filed this action as personal representative of the estate of Robert English, alleging three claims for relief against Kienke. The first alleged common law negligence. The second was under the Workers' Compensation Act, specifically Utah Code Ann. § 35-1-45, which authorizes a common law-type action by an employee against an employer who is required by the Act to obtain workers' compensation insurance coverage but fails to do so. Kienke did not carry any workers' compensation insurance on English. English's third claim was a demand for punitive damages, based on the assertion that Kienke had acted with knowing and reckless disregard of the law.

Kienke moved for summary judgment on the grounds that (1) a landlord cannot be held liable for injuries to a tenant which result from a hazardous condition created by the tenant, and (2) Kienke was not liable under section 35-1-45 because English was an independent contractor, not Kienke's employee. On plaintiff's first claim for relief, the trial court held that English was solely negligent as a matter of law and, on the second claim, held that English was an independent contractor, not an employee. Accordingly, the trial court entered summary judgment in favor of Kienke.

The court of appeals, relying on *Stephenson v. Warner*, 581 P.2d 567 (Utah 1978), and the Restatement (Second) of Torts § 355 (1965), held that a landlord is not liable for an injury caused by a dangerous condition created by a tenant and that because English created the dangerous condition that caused his death, he alone was negligent as a matter of law. *English*, 774 P.2d at 1157. The court also ruled that it was unnecessary to address the issue of whether English was Kienke's employee for purposes of the Workers' Compensation Act, because even assuming English was an employee under the Act, he could not recover in light of the court's conclusion that English was solely negligent. *Id.*

Plaintiff now contends that the court of appeals erred in not imposing upon defendant, by virtue of his status as a landlord and a landowner, and because of his superior knowledge of construction practices, the duty to apprise English of the gravity of the risk and to instruct him adequately how to eliminate that risk. Additionally, plaintiff asserts that the court of appeals erred in not concluding that English was an employee under the Workers' Compensation Act.

I. DUTY OF CARE

[1] The court of appeals acknowledged that *Williams v. Melby*, 699 P.2d 723 (Utah 1985), modified the common law duty of care landlords owe to tenants with respect to hazardous conditions on leased premises. In *Williams*, we reviewed

the development of the law, beginning with the early common law rule that a landlord was not liable to a lessee for physical harm caused by a dangerous condition on the land when the tenant took possession. We noted that with time, the general rule was modified to make landlords liable under certain circumstances for injuries resulting from dangerous conditions on leased premises. We specifically outlined four instances in which landlords could be held liable for hazardous conditions: (1) if the landlord had contracted to repair the premises; (2) if there was a hidden or latently dangerous condition which was known to the landlord and caused an injury; (3) if the premises were *156 leased for purposes of admitting the public and a member of the public was injured; or (4) if part of the premises was retained under the landlord's control but was open to the use of the tenant. *Id.* at 726. None of these circumstances are present in the instant case. Not only was the dangerous condition here created by the tenant after he took possession, but Kienke warned English to adequately support the roof. In his deposition, Kienke testified that English replied to the warning, "I understand all that. I will do it all." Therefore, English had been apprised by Kienke of the dangerous condition of the roof when English removed the supports. We therefore find no error in the conclusion of the court of appeals that Kienke, as landlord, is not liable for an injury caused by a dangerous condition created by a tenant.

Plaintiff, however, asserts that Kienke owed English a duty not only as his landlord, but also as a possessor of land upon which English came to work. In this regard, plaintiff relies upon the Restatement (Second) of Torts § 343, which states:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

For the purposes of our analysis here, we will assume that Kienke was a “possessor” of land, although under section 328E of the Restatement, a possessor is one in actual physical possession. *See id.* § 328E. Kienke did not live on the property; it was a vacant rental unit in need of repairs and renovation. Kienke visited the premises only occasionally.

[2] English was an invitee within the meaning of section 343. Section 332, comment “e” lists “a workman who comes to make alterations or repairs on land used for residence purposes” as an example of an invitee. This type of an invitee is called a “business visitor” by the Restatement because he or she “is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.” *Id.* § 332(3).¹

¹ The court of appeals misread *Williams v. Melby*, stating that this court was abandoning the common law duty analysis based on whether a plaintiff was an invitee, a licensee, or a trespasser. *Williams* dealt only with landlord/tenant law and did not deal with the duty of due care owed to invitees, licensees, or trespassers. We have recently stated that the duty of care owed by a possessor of land is determined by the status of the person who comes onto the property. *See Pratt v. Mitchell Hollow Irr. Co.*, 813 P.2d 1169, 1172 (Utah 1991).

[3] [4] Sections 343 and 343A of the Restatement impose on a possessor of land the duty to warn an invitee about two general types of hazards: (1) those that are present on the land when the invitee enters which the possessor should expect the invitee will not discover or realize, and (2) those that the possessor creates after the invitee's entry, such as in *In re Wimmer's Estate*, 111 Utah 444, 182 P.2d 119 (1947). Neither type is present here. English was an invitee (business visitor) who was engaged to make extensive repairs on the house. In so doing, he created the hazard which led to his death. There is no basis to impose on Kienke under section 343 or

343A the duty to protect English from the hazard English created when Kienke did not live on the property, had not been there for two weeks, and did not supervise or exercise control over English's work.

The dissenting opinion erroneously finds that Kienke has a duty, relying upon *Shaffer v. Mays*, 140 Ill.App.3d 779, 95 Ill.Dec. 83, 489 N.E.2d 35 (1986), and *Haberer v. Village of Sauget*, 158 Ill.App.3d 313, 110 Ill.Dec. 628, 511 N.E.2d 805 (1987). Those cases are distinguishable because in each of them, the owner retained either full or partial control over the work performed by the invitee. For that reason, the *Haberer* court relied upon the Restatement (Second) of Torts section 414, not section 343 or 343A. In *Shaffer*, the invitee was gratuitously *157 “assisting” the owner in remodeling a house and the dangerous condition was not created by the invitee, but by the owner.

[5] A limitation on the liability imposed by sections 343 and 343A was recognized in *Donovan v. General Motors*, 762 F.2d 701 (8th Cir.1985), in which plaintiff Donovan was an employee of an independent contractor who was constructing an addition to a General Motors plant. Donovan was injured in a fall while working on the unfinished roof of the addition when a plywood panel gave way under him. The court determined that section 343 of the Restatement did not apply:

In this case Donovan fell from a roof under construction by the independent contractor. None of the evidence suggests that Donovan's fall had anything to do with the condition of GM's premises before the independent contractor came on those premises. Therefore, we find the safe workplace doctrine derived from Restatement § 343 to be inapposite here. The damage alleged here did not arise out of any failure by GM to provide a safe workplace but out of the manner in

which the work was done by the independent contractor.

Id. at 704. While it is unnecessary here to determine whether English was an independent contractor, the duty owed to any classification of an invitee is the same under sections 343 and 343A and does not extend to a hazard created by the invitee.

[6] The fact that Kienke may have had superior knowledge of construction practices and skills is immaterial. This diversity of experience does not affect a possessor's legal duty. Kienke did more than the law required when he warned English to adequately support the roof. *See Hunt v. Jefferson Arms Apartment Co.*, 679 S.W.2d 875, 882 (Mo.Ct.App.1984) (holding that a warning to a construction supervisor about an open elevator shaft satisfied any duty an owner owed to his contractor).

II. ENGLISH WAS NOT AN EMPLOYEE

[7] The trial court ruled that English was an independent contractor, not an employee under the Workers' Compensation Act, and therefore, the provisions of that Act did not apply. The court of appeals did not decide whether English was an employee or an independent contractor because it concluded that English was solely negligent in causing his own death, and plaintiff could not recover under the Act in those circumstances. However, because Utah Code Ann. § 35-1-57 provides that proof of injury shall constitute prima facie evidence of negligence on the part of an uninsured employer and that the burden shall be upon the employer to show freedom from negligence resulting in such injury, we shall address the question of whether English was an employee.

In *Harry L. Young & Sons v. Ashton*, 538 P.2d 316 (Utah 1975), this court explained the difference between an employee and an independent contractor for the purpose of determining coverage of the Act:

Speaking in generality: an employee is one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the

employer and who is subject to a comparatively high degree of control in performing those duties. In contrast, an independent contractor is one who is engaged to do some particular project or piece of work, usually for a set total sum, who may do the job in his [or her] own way, subject to only minimal restriction or controls and is responsible only for its satisfactory completion.

The main facts to be considered as bearing on the relationship here are: (1) whatever covenants or agreements exist concerning the right of direction and control over the employee, whether express or implied; (2) the right to hire and fire; (3) the method of payment, i.e., whether in wages or fees, as compared to payment for a complete job or project; and (4) the furnishing of the equipment.

Id. at 318 (footnote omitted).

[8] Here, there was no agreement as to Kienke's right to direct or control English's *158 work. Kienke's supervision was sporadic at best. English was not given specific job assignments or particular duties with respect to the projects he undertook, nor was he told how to go about performing his work. Kienke simply stated that he wanted quality work done but did not want to go overboard with expenses. In essence, the arrangement was that English would engage in repair and restoration work at his convenience without supervision or direction.

English received no payment of wages or fees in the usual sense. Although the amount of the rent could be ascertained, there was no agreement as to the value to accord English's labor. English was not paid on a project basis, and there was no agreement as to how many hours of labor he would perform each week or month. Furthermore, English primarily used his own tools. Kienke provided only a power saw, a shovel, a roof jack, and a tub for mixing cement. English purchased most of the materials directly, although he was reimbursed for them.

The undefined nature of the compensation arrangement and the wide discretion allowed English in choosing projects and the manner in which he would proceed, including when and how

long he would work, lead us to conclude that English was not an employee for purposes of the Workers' Compensation Act. See *Graham v. R. Thorne Found.*, 675 P.2d 1196 (Utah 1984).

[9] Plaintiff contends that at the very minimum, Kienke was a statutory employer as defined by section 35-1-42(2). He relies upon our decision in *Bennett v. Industrial Commission*, 726 P.2d 427 (Utah 1986), where we pointed out that our statutory employer provision is a legislatively created scheme by which conceded nonemployees are deliberately brought within the coverage of the Workers' Compensation Act. However, in that case the issue was whether a contractor was liable for injuries to an employee of a subcontractor. Under the statutory scheme, such an individual is sometimes deemed a statutory employee of the contractor. That is simply not the case here.

The decision of the court of appeals is affirmed.

HALL, C.J., and DURHAM and ZIMMERMAN, JJ., concur.

STEWART, Justice, dissenting.

The majority holds as a matter of law that Albert Kienke, a landlord, owed no duty of care to Robert English, a tenant, who performed remodeling services for rent. I dissent.

The majority opinion represents an unfortunate departure from this Court's prior willingness, in light of contemporary legal developments, to undertake a realistic reappraisal of old common law concepts of tort liability of possessors of land. See, e.g., *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991); *P.H. Investment v. Oliver*, 818 P.2d 1018 (Utah 1991); *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896 (Utah 1989); *Williams v. Melby*, 699 P.2d 723 (Utah 1985).

Williams modified the common law duty of care that landlords owe to tenants with respect to hazardous conditions on leased premises.¹ We reviewed the development of landlord-tenant law in *Williams*, beginning with the early common

law rule that a landlord was not liable to a tenant for physical harm caused by a dangerous condition existing on the land when the tenant took possession. Over time, the general rule was modified to make landlords liable under certain circumstances for injuries resulting from dangerous conditions on leased premises. Prior to *Williams*, there *159 were four instances in which landlords could be held liable for hazardous conditions.² *Williams* expanded the scope of a landlord's duty by holding that landlords have "a duty to exercise reasonable care toward their tenants in all circumstances" and that "[l]andlord liability is no longer limited by the artificial categories developed by the common law." 699 P.2d at 726. The Court reversed a summary judgment in favor of a landlord, even though the tenant knew of the hazard created by a dangerously designed apartment window through which she fell, because a trier of fact could have reasonably inferred that both the landlord and the tenant were negligent.

¹ *Williams* explained the reason for that modification as follows:

The expanded liability of landlords under modern law has evolved from recognition of the fact that a residential lessee does not realistically receive an estate in land. Rather, the lessee's rights, liabilities and expectations are more appropriately viewed as governed by contract and general principles of tort law.

699 P.2d at 727; see also W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 63, at 434-35 (5th ed.1984) (discussing social policies supporting a modification of the traditional common law duty owed tenants by landlords).

² *Williams* stated that a lessor could be liable for negligence if

- (1) he had contracted to repair the premises;
- (2) there was a hidden or latently dangerous condition which was known to the lessor and caused an injury;
- (3) the premises were leased for purposes of admitting the public and a member of the public was injured; or
- (4) part of the premises was retained under the lessor's control, but was open to the use of the lessee.

699 P.2d at 726 (citations omitted).

The legal relationship between English and Kienke was more than a simple landlord-tenant relationship. Although the labor English performed constituted rent, his remodeling activities differed from the ordinary and usual activities of a tenant. English, however, was not an independent contractor in the usual or typical sense of that term: he was not licensed as an independent contractor; he was not experienced in construction; and he did not remodel for anyone but Kienke and only remodelled for the purpose of paying rent. In any event, whether or not English was technically an independent contractor, Kienke still owed English a duty of due care under the circumstances. See *Haberer v. Village of Sauget*, 158 Ill.App.3d 313, 110 Ill.Dec. 628, 511 N.E.2d 805 (1987).

The majority acknowledges the change in the law made by *Williams*, but asserts that the old common law principle that “tenants are liable for any dangerous condition on the premises which they create” governs this case. Accordingly, the majority holds that English was an invitee and that Kienke owed him no duty of care because English created the hazard that caused his death. The majority states:

English was an invitee (business visitor) who was engaged to make extensive repairs on the house. In so doing, he created the hazard which led to his death. There is no basis to impose on Kienke under section 343 or 343A [of the *Restatement (Second) of Torts*] the duty to protect English from the hazard English created when Kienke did not live on the property, had not been there for two weeks, and did not supervise or exercise control over English's work.

I submit that the majority misapplies §§ 343 and 343A of the *Restatement (Second) of Torts*

(1965). Section 343 states the general rule as to a landowner's liability:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) *should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and*

(c) *fails to exercise reasonable care to protect them against the danger.*

(Emphasis added.) Kienke obviously knew of the risk of harm to English and should—and did—expect that English would *not* realize the danger. Whether Kienke failed to exercise “reasonable care to protect” English, specifically, whether the warning Kienke gave English was legally sufficient to discharge his duty of due care under the circumstances, raises a material issue of fact that a jury should decide.

Certainly a landowner's warning of the hazards an invitee may encounter may be sufficient to discharge the landowner's duty of due care. See *Restatement (Second) of Torts* § 343 cmt. d, at 217. See *160 *generally* § 343A cmt. e., at 219. A warning may not be sufficient, however, if the landowner has reason to expect that the invitee may suffer physical harm despite his general awareness of the hazardous condition or its obviousness. In that event, a landowner must take other reasonable steps to provide for the safety of the invitee. See § 343A cmt. f(c), at 220. On facts similar to the instant case, the court in *Shaffer v. Mays*, 140 Ill.App.3d 779, 95 Ill.Dec. 83, 489 N.E.2d 35 (1986), applying §§ 343 and 343A of the *Restatement*, held that a homeowner owed a duty of care to an invitee who, in remodeling a home, created the hazard that caused his injuries. See also *Haberer v. Village of Sauget*, 158 Ill.App.3d 313, 110 Ill.Dec. 628, 511 N.E.2d 805 (1987).

In this state, persons hired to perform work for a landowner are business invitees. *In re Wimmer's Estate*, 111 Utah 444, 449–51, 182 P.2d 119, 121–23 (1947). We have also held that although a landowner may not have a duty of care to an invitee with respect to a dangerous condition that is known or obvious to the invitee, this rule does not preclude liability if the landowner should have anticipated harm to the invitee. *Moore v. Burton Lumber & Hardware Co.*, 631 P.2d 865, 868 (Utah 1981); *see also Restatement (Second) of Torts* § 343A(1), at 218. Indeed, we have long recognized a landowner's duty to use reasonable care to protect invitees from dangerous conditions on the premises. *Rogalski v. Phillips Petroleum Co.*, 3 Utah 2d 203, 208, 282 P.2d 304, 307 (1955); *In re Wimmer's Estate*, 111 Utah at 452, 182 P.2d at 123. That duty runs to all workers, irrespective of their status as employee, independent contractor, or otherwise. *See Robertson v. Sixpense Inns of Am., Inc.*, 163 Ariz. 539, 789 P.2d 1040, 1045 (1990) (en banc).

Under the principle stated in § 343 of the *Restatement*, a jury should determine the adequacy of Kienke's warning. I submit that the majority's mechanical and rigid application of the rule that a landowner is not liable for an injury caused by a hazard created by an invitee does not comply with the *Restatement* and is bad policy under comparative negligence law.

A jury could reasonably conclude that Kienke was negligent to some degree and that English was not solely responsible for his death. It is undisputed that Kienke told English he should support the porch roof with “plenty of 2 x 4's.” Whether that warning was sufficient, given the nature of the risk, the relative experience and knowledge of English and Kienke, and other circumstances, raises factual issues that cannot legitimately be resolved on summary judgment. There is no evidence in the record as to how many two-by-fours should have been placed under the roof to provide adequate support or how many were in fact put in place as temporary supports. Nor does the evidence indicate how apparent the risk would have been to a layperson such as English or how great the risk was that the roof would collapse without proper support. There is, however, evidence that

Kienke had superior knowledge as to the nature and strength of the internal structure of the porch roof. Certainly, Kienke was far more knowledgeable than English as to the nature of the risk and what steps were necessary to avoid the hazard. Clearly, there are a number of factual issues that need to be explored to determine the adequacy of Kienke's warning. In any event, Kienke failed to meet his burden on his motion for summary judgment of showing that there were no material issues of fact and that he was entitled to judgment as a matter of law.

We have consistently held that summary judgment should be granted in negligence cases only in the “most clear instances.” *Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983); *see also Apache Tank Lines, Inc. v. Cheney*, 706 P.2d 614, 615 (Utah 1985); *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982). Because Utah is a comparative negligence state, that rule has special force when a party asserts, as a matter of law, that the other party was solely negligent and that that party's negligence was the sole proximate cause of the injury. Where there are legitimate inferences that both parties were negligent, it is not for a court to decide as a matter of law that one party's degree of negligence was of sufficient *161 magnitude when compared with that of the other party to warrant summary judgment. The task of measuring the relative degree of negligence is for the trier of fact, unless the absence of negligence of one party is clear on any reasonable view of the evidence. As we stated in *Williams*:

Even though plaintiff may have been negligent, summary judgment is an altogether inappropriate procedure for assessing her degree of negligence against the negligence of the defendants. In the days when contributory negligence was an absolute defense in a negligence action, summary judgment could be used to dispose of negligence actions without depriving a plaintiff of his right to a trial on the merits. Now, however,

contributory negligence is not an absolute defense, and summary judgment is rarely an appropriate remedy for resolving negligence actions.

699 P.2d at 728.

I would reverse and remand for a trial.

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I hereby certify that on the date below I caused a true and correct copy of the foregoing to be delivered to the Court of Appeals, Division II, via the Appellate Courts' Portal, and to all counsel of record indicated below via email to the addresses below pursuant to the parties' electronic service agreement.

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